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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6025

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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REUBEN DOWLING,

*Petitioner,*

v.

UNITED STATES OF AMERICA

---

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## JOINT APPENDIX

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ROBERT L. TUCKER *
Federal Public Defender
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*Counsel for Petitioner*

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*Counsel for Respondent*

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**PETITION FOR CERTIORARI FILED NOVEMBER 28, 1988**
**CERTIORARI GRANTED FEBRUARY 27, 1989**

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DISTRICT COURT OF THE VIRGIN ISLANDS

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No. 85-70

UNITED STATES

v.

REUBEN DOWLING

---

No. 85-71

GOVERNMENT OF THE VIRGIN ISLANDS

v.

REUBEN DOWLING

---

**DOCKET ENTRIES**

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| DATE | PROCEEDING |
|---|---|
| 08/22/85: | Information filed in *United States v. Reuben Dowling* and Information filed in *Government of the Virgin Islands v. Reuben Dowling*. |
| 11/12-14/85: | Jury trial both Informations: hung jury. |
| 03/31-04/2/85: | Petitioner's second trial: guilty verdicts returned. |
| 04/25/85: | Judgment of the District Court pursuant to jury's verdict. |

| DATE | PROCEEDING |
|---|---|
| 06/26/87: | Opinion and judgment of the United States Court of Appeals for the Third Circuit reversing the petitioner's conviction and remanding for a new trial. |
| 09/22-24/87: | Petitioner's third jury trial: guilty verdicts returned. |
| 09/25/87: | Judgment of the District Court pursuant to jury verdict. |
| 08/22/88: | Opinion of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction. |



IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF SAINT CROIX

---

Criminal No. 85-70

18 U.S.C. § 2113(a), (d)

BANK ROBBERY

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

REUBEN DOWLING,
*Defendant.*

---

**INFORMATION**

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The United States Attorney charges:

COUNT I

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did, with the use of force and intimidation, take from the person and presence of another money, said money having been in the care, custody, control, management and possession of the First Pennsylvania Bank, Frederiksted Branch, St. Croix, the deposits of said bank being insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. § 2113 (a).

COUNT II

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did, in committing an offense defined in 18 U.S.C. § 2113(a), put in jeopardy the

lives of employees and customers of the First Pennsylvania Bank, Frederiksted Branch, St. Croix by the use of a dangerous weapon, to wit: A handgun, in violation of 18 U.S.C. § 2113(d).

Dated: August 21, 1985.

JAMES W. DIEHM
United States Attorney

By: /s/ Andrew J. Reich
ANDREW J. REICH
Assistant U.S. Attorney



TERRITORY OF THE VIRGIN ISLANDS )
) ss:
DIVISION OF SAINT CROIX )

## AFFIDAVIT

I, Lawrence E. Motta, Jr., first being duly sworn depose and say:

1. That I am employed by the Virgin Islands Police Department as a Detective/Corporal assigned to the Investigation Bureau;

2. That while thus employed, I was assigned to conduct a follow up investigation into a robbery that occurred on July 8, 1985, at the First Pennsylvania Bank, located on Strand Street, Frederiksted, St. Croix.

3. That the deposits of the First Pennsylvania Bank are insured by the Federal Deposit Insurance Corp.;

4. That eyewitnesses to the robbery, stated that the Bank was robbed by a lone gunman, wearing a mask;

5. That the witnesses and bank officials stated that the gunman took approximately $7,833.00 in U.S. currency from the bank teller, approximately $5,000.00 in U.S. curreny from a customer, and that travelers checks and personal checks were also taken;

6. That thereafter the lone gunman left the Bank and made good his escape by taking a taxi van, CP-294 at gunpoint, from Maurice Hamilton;

7. That the taxi van CP-294 was abandoned in Estate Smithfield;

8. That while driving away from the scene, the gunman was observed by a witness removing his mask (Witness No. 1);

9. That prior to abandoning the taxi van CP-294, the gunman was seen maskless in the Estate Smithfield area, by two individuals, (Witnesses No. 2 and No. 3);

10. That photo arrays were displayed in separate sessions to Witnesses No. 1, No. 2 and No. 3, at which time identifications were made by Rueben Dowling;

11. That on August 12, 1985, a physical line-up consisting of Rueben Dowling and other male individuals was viewed by the three witnesses, but no positive identification was made at that time;

12. That on August 13 and 14, 1985, photo arrays were again displayed in separate sessions to the three witnesses who viewed the physical line-up on August 12, 1985;

13. That the three witnesses independently selected the photograph of Rueben Dowling, and claimed that they had seen him in the line-up of August 12, 1985, but were afraid to identify him at that time;

WHEREFORE, in view of the aforementioned, your affiant has probable cause to believe that Rueben Dowling committed the crimes of BANK ROBBERY, in violation of 18 U.S.C. § 2113(a) and (d); GRAND LARCENY, in violation of 14 V.I.C. § 1083; ARMED ROBBERY, in violation of 14 V.I.C. § 1862(2); POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE, in violation of 14 V.I.C. § 2253(a); UNAUTHORIZED USE OF A VEHICLE, inviolation of 14 V.I.C. § 1382; and ASSAULT THIRD DEGREE, in violation of 14 V.I.C. § 297(2).

/s/ Lawrence E. Motta, Jr.
LAWRENCE E. MOTTA, JR.
Detective/Corporal
V.I. Police Department
ST. Croix, Virgin Islands

Subscribed and sworn before me this 21st day of August, 1985.

/s/ [Illegible]
Notary Public



IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

---

Criminal No. 85-71

Title 14 V.I.C. § 1083
Title 14 V.I.C. § 1862(2)
Title 14 V.I.C. § 2253(a) & 2254
Title 14 V.I.C. § 1382
Title 14 V.I.C. § 297(2)

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

vs.

RUEBEN DOWLING,
*Defendant.*

---

GRAND LARCENY; ARMED ROBBERY; POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME OF VIOLENCE; UNAUTHORIZED USE OF A VEHICLE; ASSAULT THIRD DEGREE

---

**INFORMATION**

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The United States Attorney charges:

COUNT I

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully take United

States currency from Irma Williams, Isabel Sanes and Mae Burwell, employees of the First Pennsylvania Bank, Frederiksted Branch, St. Croix, from their immediate presence and against their will, by means of force and fear by displaying, using and threatening to use a dangerous weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 1862(2).

COUNT II

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Irma Williams with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT III

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Isabel Sanes with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT IV

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Mae Burwell with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT V

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING, when not authorized by law to do so, did possess and carry about his person a firearm used during the commission of a crime of violence, to-wit: Robbery and assault in violation of Title 14 V.I.C. § 2253(a) and 2254.



COUNT VI

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully steal and carry away property with a value in excess of one hundred dollars ($100.00) belonging to the First Pennsylvania Bank, Frederiksted Branch, St. Croix, with the intent to permanently deprive the owner thereof, in violation of 14 V.I.C. § 1083(1).

COUNT VII

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully take a taxi van from Maurice Hamilton, from his immediate presence and against his will, by means of force and fear by displaying, using and threatening to use a dangerous weapon; to-wit: A handgun, in violation of title 14 V.I.C. § 1862(2).

COUNT VIII

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING, a person not entitled to possession of a taxi van, license plate number CP-294, belonging to Maurice Hamilton, did possess, use and drive said vehicle without the consent of the owner and with intent to deprive said owner, temporarily or otherwise thereof, in violation of Title 14 V.I.C. § 1382.

Dated: August 21, 1985.

JAMES W. DIEHM
United States Attorney

By: /s/ Andrew J. Reich
ANDREW J. REICH
Assistant U.S. Attorney

TERRITORY OF THE VIRGIN ISLANDS )
) ss:
DIVISION OF SAINT CROIX )

## AFFIDAVIT

I, Lawrence E. Motta, Jr., first being duly sworn depose and say:

1. That I am employed by the Virgin Islands Police Department as a Detective/Corporal assigned to the Investigation Bureau;

2. That while thus employed, I was assigned to conduct a follow up investigation into a robbery that occurred on July 8, 1985, at the First Pennsylvania Bank, located on Strand Street, Frederiksted, St. Croix;

3. That the deposits of the First Pennsylvania Bank are insured by the Federal Deposit Insurance Corp.;

4. That eyewitnesses to the robbery, stating that the Bank was robbed by a lone gunman, wearing a mask;

5. That the witnesses and bank officials stated that the gunman took approximately $7,833.00 in U.S. currency from the bank teller, approximateyly $5,000.00 in U.S. currency from a customer, and that travelers checks and personal checks were also taken;

6. That thereafter the lone gunman left the Bank and made good his escape by taking a taxi van, CP-294 at gunpoint, from Maurice Hamilton;

7. That the taxi van CP-294 was abandoned in Estate Smithfield;

8. That while driving away from the scene, the gunman was observed by a witness removing his mask (Witness No. 1);

9. That prior to abandoning the taxi van CP-294, the gunman was seen maskless in the Estate Smithfield area, by two individuals, (Witnesses No. 2 and No. 3);



10. That photo arrays were displayed in separate sessions to Witnesses No. 1, No. 2 and No. 3, at which time identifications were made of Rueben Dowling;

11. That on August 12, 1985, a physical line-up consisting of Rueben Dowling and other male individuals was viewed by the three witnesses, but no positive identification was made at that time;

12. That on August 13 and 14, 1985, photo arrays were again displayed in separate sessions to the three witnesses who viewed the physical line-up on August 12, 1985;

13. That the three witnesses independently selected the photograph of Rueben Dowling, and claimed that they had seen him in the line-up of August 12, 1985, but were afraid to identify him at that time;

WHEREFORE, in view of the aforementioned, your affiant has probable cause to believe that Rueben Dowling committed the crimes of BANK ROBBERY, in violation of 18 U.S.C. § 2113(a) and (d); GRAND LARCENY, in violation of 14 V.I.C. § 1083; ARMED ROBBERY, in violation of 14 V.I.C. § 1862(2); POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE, in violation of 14 V.I.C. § 2253(a); UNAUTHORIZED USE OF A VEHICLE, in violation of 14 V.I.C. § 1382; and ASSAULT THIRD DEGREE, in violation of 14 V.I.C. § 297(2).

/s/ Lawrence E. Motta, Jr.
LAWRENCE E. MOTTA, JR.
Detective/Corporal
V.I. Police Department
ST. Croix, Virgin Islands

Subscribed and sworn before me this 21st day of August, 1985.

/s/ [Illegible]
Notary Public

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

---

Criminal No. 1985/70

BANK ROBBERY

UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

REUBEN DOWLING,
*Defendant.*

---

Criminal No. 1985/71

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

vs.

REUBEN DOWLING,
*Defendant.*

---

**JUDGMENT AND COMMITMENT**

On the 24th day of September, 1987 came the Assistant United States Attorney for the Government, and the defendant appeared in person and with counsel, Melody L. Moss, Esquire, Assistant Federal Public Defender.

The defendant was charged with:

Bank Robbery—Count I & Count II (Cr. No. 85/70)

Robbery First Degree—Counts I & VI (Cr. No. 85/71)



Assault Third Degree—Counts II & III

Possession of a Firearm During the Commission of a Crime of Violence—Count IV

Grand Larceny—Count V

Unauthorized Use of a Vehicle—Count VII

At arraignment, the defendant pleaded Not Guilty. A jury trial was demanded by the defendant and on September 22, 1987, the jury trial commenced and concluded on September 24, 1987. The jury returned a verdict finding the defendant Guilty of

Bank Robbery—Count I (Cr. No. 85/70

Robbery First Degree—Counts I & VI (Cr. No. 85/71)

Assault Third Degree—Count II & III

Grand Larceny—Count V

Unauthorized Use of a Vehicle—Count VII

The matter having been referred to the Probation Office for a pre-sentence investigation and report, which has been filed with the Court, the defendant was given an oppportunity to make a statement in his own behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of twenty(20) years on Count I of the Federal Information, Criminal No. 85/70 and Counts I, II, III and V of the Virgin Islands Government Information, Criminal No. 85-71.

Defendant shall also pay fine of 50.00 for costs.

Pursuant to 14 V.I.C. Sec. 61 and 62, defendant is committed to the custody of the Director of the Bureau of Corrections for imprisonment for a period of fifty (50)

years on Count VI and VII in Criminal No. 85/71. At least ten (10) years of the sentence imposed herein shall be served without parole, probation, suspension or reduction by good time or otherwise. Sentence imposed on Counts VI and VII shall be served consecutive to the sentence imposed on Count I in Criminal No. 85/70 and Counts I, II, III and V in Criminal No. 85/71.

It is ADJUDGED that the defendant be given credit for time served in pre-trial detention.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated: September 25, 1987

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN
District Court Judge

Attest: Orinn Arnold
Clerk

by: /s/ Alice A. Maynard
Deputy Clerk



IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

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(Title Omitted in Printing)

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**EXCERPTS FROM TRANSCRIPT OF 9-22-87**

* * * *

[6] ATTORNEY MARSHACK: We have a 404B motion, Your Honor.

THE COURT: Go ahead with that.

ATTORNEY MARSHACK: At this time?

THE COURT: Yes, sir, unless you prefer to make it in open court as well. It is up to you.

ATTORNEY MARSHACK: We are proffering under Rule 404B, we proffered the testimony of Vera Williams —Vera Henry, who lived at number 99 Strawberry on the 21st or the 22nd of July within a period of two weeks of the robbery in which Mr. Dowling is alleged to have entered the First Pennsylvania Bank in Frederiksted wearing a hat with or—an herb hat or a mask with only the eye holes cut out in the knitted mask and carrying a small handgun.

He entered the house of Vera Henry wearing a mask with only the eye holes cut out and carrying a small handgun, and in his company was a man named Delroy Christian. During the time that he was in the house of Vera Henry he expended a shot. It was an automatic weapon [7] so that the shot's casing came out and landed on the ground. It was collected by Officer Michael Freeman who gave it to Officer George Bennerson.

During the time there was a scuffle and Mrs. Vera Henry, a woman who at that time at least in her fifties

pulled the brown knitted cap with the eye holes cut out off the head of the Defendant; that was Reuben Dowling. The Government offers this evidence as to the identity of the man who was in the First Pennsylvania Bank two weeks earlier.

I guess I would be divulging a little bit of additional testimony that I will bring in this case that was not brought in the last case, that on the night before the bank robbery Phillip Tutein lent a white Volkswagen to Reuben Dowling. On the morning of the bank robbery, the Volkswagen with the license plate number C-46470, is a white Volkswagen owned by Phillip Tutein was seen on the Mahogany Road by Captain—Chief Anthon Christian of the Virgin Islands Police Department who noticed that the car was stalled in the middle of the road.

There was a person sitting in the back with a dark knitted hat, had a dark [8] complexion and a very large frame and had on a green army fatigue shirt. He made a note of that, later in the day when he heard the all points bulletin broadcast for the robbery of the bank.

At about 2:15 in the afternoon, Sgt. Anita Christian and Police Officer Jesus Roman were patrolling in the Frederiksted area near the ballpark and saw a white Volkswagen. The white Volkswagen was occupied by Peter Golden and Delroy Christian, a cousin to Anita Christian. The door was open and Delroy Christian was sitting in the back seat. The police pulled up and they said, close the door because it was obstructing the road. Anita waved at her cousin, who acknowledged her, Delroy Christian.

The police drove around, keeping that vehicle in view. After a period of two or three minutes, seeing the police car in view, Peter Golden and Delroy Christian took the white Volkswagen and drove out of Frederiksted. This takes us to 2:20, 2:23 to 2:25. They drove out with the police behind them to the Northside Road, making a right on Mahogany Road. After they made the right the police followed them all [9] the way to the La Grange intersection. Before turning around and returning to their patrol, during the next several minutes they heard a broadcast of a bank robbery at the First Pennsylvania Bank.



The entry of Reuben Dowling into the home two weeks —within two weeks of the bank robbery, in the presence of Delroy Christian, carrying a small handgun and wearing a mask with only the eye holes cut out creates three times as much identity—probative identity evidence, showing that it is the same person that entered the bank on July 8th, wearing a mask with the eye holes cut out, carrying a small caliber handgun, was the same person involved in the Strawberry incident with Delroy Christian, who was not available to assist Mr. Dowling to get away from the bank he robbed, causing him the need to force Mr. Maurice Hamilton at gunpoint to turn over his vehicle so that he could make the getaway.

There would also be people in the bank testifying that when Mr. Dowling came out of the bank that he looked up and down both streets for a period of time before [10] commandeering the van. I think the evidence is fair and clear. Should I go through the case, Your Honor?

THE COURT: Make your presentation as you choose.

ATTORNEY MARSHACK: Rule 404B says that other crimes, wrongs or acts of evidence is not admissible to prove character or propensity.

THE COURT: Do I understand from my own memory that Mr. Dowling was acquitted of that Strawberry matter?

ATTORNEY MARSHACK: Yes, Your Honor.

THE COURT: Well, if it is admitted, I think in the interest of justice it would have to be brought out that, in as far as any criminal matters are concerned, Mr. Dowling was acquitted of that, and this—it is being offered only for the identification and the information.

ATTORNEY MARSHACK: Even absent the acquittal, Your Honor, such an instruction is mandated by all of the circuits.

THE COURT: Go ahead, sir—[11] excuse me. Is Mr. Joseph there? Bring him in. I'm going to take care of Mr. Joseph and get him out.

(Whereupon, Mr. Joseph was escorted into the chambers and the following occurred)

THE COURT: Good morning, Mr. Joseph. How are you, sir?

MR. JOSEPH: Fine.

THE COURT: Mr. Joseph, I am going to excuse you from sitting on this case, not for any fault of yours but some information has come to us that your wife is the baby sitter for the child of one of the ladies that works at the Public Defender's Office.

MR. JOSEPH: Yes.

THE COURT: And because of that and in the excess of caution, because I have four alternates I am going to excuse you from having to sit on this case. Thank you for being here this morning, and we will see you on October 5th. Were you picked on the next one?

MR. JOSEPH: No.

THE COURT: You're excused until somebody calls you. Thank you very much, [12] Mr. Joseph.

MR. JOSPEH: Right.

(Whereupon, Mr. Joseph was excused and the following occurred out of his presence back in chambers)

ATTORNEY MARSHACK: The standards for admission of other crimes of evidence need not be beyond a reasonable doubt or in fact even to clear and convincing evidence, but it must clearly be relevant.

I cite *United States v. Mitchell*, 666, F.2nd, 1385. It is a 1982 case out of the 5th Circuit and Cert. was denied, 102 Supreme Court 2943.



THE COURT: Excuse me. Do you intend to tie the color of the alleged mask?

ATTORNEY MARSHACK: It is a different color. A different color ski mask was admitted from that that was used during the charged robbery. The color ski mask that was taken from the individual, not in connection with any crime at all, was admitted, notwithstanding the difference in color from that that was used during the charged robbery.

*Thomas v. United States*, 343, [14] at D.C., 333, F.2nd at 90.

In *Hope v. United States*, 342, F.2nd, pg. 153, that is a 1965 5th Circuit case. There is a close—in that case the court held that the close connection in time, place or manner was sufficient for the admission of such evidence. Here we have less than two weeks, same island and three common features each which are distinct. We talk about the mask and I cited the case for that.

For a gun case we need not go very terribly far because the 3rd Circuit said at 685, F.2nd, at pg. 860, the right cite for that is 857 Government v. Shelly Joseph. In that case the court held that on the testimony of a friend of Shelly Joseph, that two months prior to the crime of which he was charged at that time he was in possession of a gun different than the gun used in the crime for which he was charged. The court said that it was not an error and, to be fair, that was reversed.

THE COURT: That was reversed on improper submission to the jury of a document.

ATTORNEY MARSHACK: In the case of *United States v. Covelli*, 738, F.2nd, [15] 847, a 1984 case, the court admitted testimony that an earlier time Mr. Covelli tapped his leg and said, I've got an equalizer that makes me as big or bigger than anyone. And the girlfriend testified that while living with him in 1978 that she saw him possess a small gun. The court held that the

possession of a small gun was sufficiently distinct to be admitted pursuant to 404B.

In a case which I think most closely parallels this one, *United States v. Etherton*. 519 F.2nd at 60, that is a 1st Circuit case, Cert. denied, US 1987. The court held that the fact that a bank robber held a silver gun and tape on its nose in an uncharged bank robbery was sufficient, annexes in similarity to admit that evidence in the charged bank robbery which he used a silver gun and tape on its nose. I would submit that the court has found unique the carrying of a small handgun. The court found significant, as a matter of fact, different colors distinct, as you will see, because the brown mask is a—I guess they are called herb hats, and you will see that one of the ones that was seized at the home at Strawberry had cutout eye holes. The people in the bank will testify that although [16] the mask used was of a different color and there were eye holes and no mouth holes.

I looked throughout this island for a store that sells ski masks and looked for catalogs containing balaclavas that are used on slopes, which have holes cut out for the eyes and the mouth. I couldn't find one. There is no ski store here on St. Croix.

If the Court recalls the case of Raymond Peterson, and there is some relevance here where there are some similarities here. He had a mask, herb hat with nothing cut in it, absolutely, which he pulled down over his face tight enough so that he could see through the weaved strings. When he turned to drive away in the stolen truck he pulled it off his head and made himself identifiable.

THE COURT: Nobody ever credited The Mexican with a great deal of smarts. That was his nickname. Have you completed your argument?

ATTORNEY MARSHACK: Your Honor, there are three major characteristics. They are to be viewed as either identity or surrounding circumstantial evidence.



They are [17] necessary in surrounding circumstantial evidence to tie the presence of Delroy Christian in the white car to Delroy Christian entering the house at Strawberry. They all go to the identity of the person in the bank.

THE COURT: Miss Moss.

ATTORNEY MOSS: Your honor, I don't think that the common features of a mask and a handgun and the arguable presence of another person in that car constitutes—arises to the standards that it must arise to. I submit that under 404B, the characteristics, the quality for an identity for this evidence to be admitted as an identity, to go to identity must rise to the class of a signature of crimes. There are many many cases on signature of crimes. I think that with each set of facts, the set of facts is the key in each case, and that with those set of facts you have different rules, depending on the circumstances of the robberies or crimes committed. I think that under Rule 404B Attorney Marshack stated that he didn't believe that the standard was to clear and convincing evidence. My understanding is that it is to clear and convincing evidence, and I think that alone, that the fact that Mr. Dowling [18] was acquitted of the crime at Strawberry—

THE COURT: He was not acquitted on the issue of identification. I don't believe so.

ATTORNEY MARSHACK: Your Honor, having the case described to me—I wasn't here—but the Defense in the case presented, not through Mr. Dowling but through his co-defendant Delroy Christian, it was not a robbery. The two of them merely came to retrieve from an individual in the house money from an individual in the house.

THE COURT: Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think, took the stand.

ATTORNEY MARSHACK: He had not. Mr. Christian did.

ATTORNEY MOSS: Nonetheless, I think the prejudicial effect is obvious and a chief concern of course of mine. Another standard of this evidence is that there is a substantial need for this evidence. I would submit under the circumstances there is no substantial need for this evidence of the presence [19] of Mr. Dowling in another home, in a home opposed to a bank, with a mask on and carrying a small handgun. I don't think that the fact that he has on a mask and carrying a small handgun has at all a significant signature type quality to it. There are, I am sure, thousands of people who have attempted to commit crimes with masks on, be it the holes cut out, be the holes already in the mask, and I seriously question whether this evidence rises to any kind of a quality to get it in under Rule 404B.

I cited for purposes of discussion of signature crimes *United States v. Gutierrez*, 696, F.2nd 753. This is a 1982 case and it comes out of the 10th Circuit.

*United States v. Ortega Chavez*, out of the 5th Circuit, 1982 case 682, F.2nd, 1086.

*United States v. Dansker* out of the 3rd Circuit. 1976, 537, F.2nd, 40.

THE COURT: Is that your argument, Miss Moss?

ATTORNEY MOSS: Yes, Your Honor. I believe that arguably Attorney Marshack has presented his idea of what the [20] consequential findings to which this evidence will go. I submit, of course, applying it as well to the other standards that to the other requirements under Rule 404B that he does not meet the test. And I submit that even if the Court finds that it does meet the test it certainly failed under Rule 403 as to the relevance, especially in light of trying to get at Mr. Dowling in a potential manner or obviously in a prejudicial manner of doing it.

THE COURT: Mr. Marshack?

ATTORNEY MARSHACK: I want to address two things. One thing I want to address is the substantial



need. Without this the line of evidence leading to Mr. Delroy Christian and tying the absence of the white vehicle of the need to take the van of Maurice Hamilton isn't very tenuous.

Additionally, with respect to substantial need, the identification evidence which was available has been excluded by the manner in which the police in my office did the identification. The Court is presently considering additionally other testimony which may make identity very very difficult for the [21] Government to prove. Even in the absence of that, John Chamble, the Defense lawyer in the last case, got here with respect to identification. So I believe there is a substantial need on all of those before you. And with respect to signature crime rules, I quote from *United States v. Gates*, which is reported at 481, 24, that is quoted by Drew, that any probative evidence is inherently prejudicial, but when the evidence is relevant and important to one of the five exceptions it is generally conceded that the prejudicial effect may be outweighed by the probative value.

I believe that Gates is presently either before the Supreme Court or it was announced in the last term—I mean in the beginning of this term. I want to talk about two cases briefly. With respect to signature crimes in the actions of the Court of Appeals, I think the further that the court has gone in admitting other crime evidence is *Gally v. United States* 408, F.2nd, 1220, out of the District of Columbia, 1979. There the court found no error in a trial court's admission of an 8-year-old assault and robbery charge during defendant's [22] trial for a felony murder and assault to commit rape. The defendant was accused of approaching his victim at her home in the District of Columbia on the grounds to seeking to enter the room and killing her. After a second motivated attack the trial court admitted evidence that eight years earlier in West Virginia, hundreds of miles from the District of Columbia, that the defendant assaulted a hotel night clerk after she had escorted him to a room as he requested. When he threatened to rape

her the clerk offered the defendant money. He took it and fled. The Court of Appeals found significant similarities in the modus operandi probative to the identity to similarly what Gates talked about. Two different kinds of attacks in areas apart in time; one was a rape and one was a robbery.

Your Honor, here we have events within two weeks showing a small handgun, and I cited the cases, that is enough by itself, and I think even on the basis we have more than enough reason to allow this evidence to be admitted. And I believe that it is necessary to tie these two lines of identification together.

ATTORNEY MOSS: Your Honor, [23] one more thing regarding substantial need. I would like to highlight—I think the Court is aware this evidence would go to what I call a second theory of the prosecution. They do have a primary theory, which is the theory that the defendant was arrested in the first trial, and that that evidence would in fact go to a second theory, so that there is a real question of substantial need under the circumstances.

THE COURT: The discussion that we have just heard, while it deals with 404B also deals with a classic situation of circumstantial evidence insofar as it is sought to demonstrate through the Tutein vehicle being lent to Mr. Dowling, the presence of Mr. Delroy Christian in the Tutein vehicle and then earlier or later, rather, a relationship between Mr. Delroy Christian and Mr. Dowling. This is classic circumstantial evidence from which inferences are sought to be drawn.

Carrying that further, the Government seeks under 404B to link not only Mr. Christian but a mask and a gun to an occurrence two weeks after the bank robbery at the home of Miss Henry. The common features that link the [24] bank robbery and the later occurrence are largely the mask and the gun, albeit a mask of different color or the like, and no evidence that the gun was the same, except that it was a small caliber handgun.



I find by clear and convincing evidence that that evidence falls well within the ambits of 404B in which we deal on a case-by-case basis with the evidence sought to be presented. Measure that end and vice versa and decide does it fit into the realm of relevance, and I find without any question that it is relevant. If Mr. Dowling was used to the use of a mask and a gun in certain endeavors and I find that it is more probative than prejudicial because I could secure whatever prejudice that might arise by pointing out to the jury that in that later instance Mr. Dowling was not convicted, in fact was acquitted of the incident. So he is certainly not on trial of anything borne of that. And for those reasons, then, I would allow the Government to, pursuant to 404B, to present evidence relating to the occurrence at Strawberry in the Henry House—home, and I will allow the Government to present evidence of the [25] Volkswagen and the presence of Mr. Delroy Christian in the area at the time of the robbery. Thank you.

We will move now to court.

(Whereupon, the following occurred in open court out of the presence of the jury)

THE COURT: Before the jury comes in this is the time fixed for me to make a ruling on three areas in which arguments and evidentiary presentations were made yesterday. The first one is the motion of the Defendant to bar the use of certain photographs that constitute one or more of an array that were used by the Department of Public Safety. I am going to allow the photographs on the grounds that they are not overly suggestive, and that any claims to that effect may be handled through cross examination and arguments.

I should also say that a more detailed order is going to be entered on each of these areas. With respect to the search, the unwarrantless search of the home of Jennifer Dowling and Reuben Dowling, I'm going to suppress any bullets or anything received in that search.

## TESTIMONY OF VENA HENRY

[Transcript of 9-23-87 and 9-24-87]

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[91] ATTORNEY MARSHACK: I call Vena Henry, please, Your Honor.

ATTORNEY MOSS: Your Honor, while she is on her way, may we approach the bench?

(Side bar Conference)

[92] ATTORNEY MOSS: I just want to renew my motion based on Rule 404(b) and Rule 403.

THE COURT: I will deny the motion, but I will ask that the prosecutor make sure he carefully elicit the testimony he plans to elicit from her.

ATTORNEY MARSHACK: I will, sir.

VENA HENRY,

after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY ATTORNEY MARSHACK:

Q Good afternoon.
A Good afternoon.
Q Could you move the microphone down towards you so we can all hear you? Could you tell me your name, please?
A My name is Vena Henry.
Q Could you spell your first name for Mr. Rodriquez?
A V-E-N-A.
Q Where do you live?
A 99 Strawberry.
Q How long have you lived there?
A Eight years this year.

[93] Q Eight years this year. Were you living there on the 8th day of July 1985 in the —9:00 in the morning?

A Yes.



Q Did anything unusual happen?
A Yes.
Q Would you tell us what happened?

THE COURT: No, sir, that is too general a question. I would not permit it.

Q Did there come a time when any individual entered your house that day?
A Yes.
Q How many were there?
A Two persons.
Q Was any of them wearing anything over their head?
A One of them was wearing a mask over their face.
Q Was any of them carrying anything in their hand?
A Yes, small gun.
Q What color?
A Black silvery gun.
Q Did there come a time during that—was that the same person who was wearing the mask over their [94] head or a different person?
A The same person with the mask hand a gun.
Q Did there come a time when the mask was taken from that person's head?
A Yes.
Q Who took it from their head?
A I raise it half way and the person took it off and dump it on the table.

ATTORNEY MARSHACK: I ask that this be marked as Government's Exhibits Number 19.

THE COURT: Yes.

BY ATTORNEY MARSHACK:

Q Have you ever seen that before today?
A Can I look at it?
Q Yes, look at it.
A Yes, I do, before.

Q Was that carried away from your house when the two men left?

A No.

Q The man who was wearing that brown mask over his head do you see him in the courtroom today?

A Yes, across there.

Q What's he wearing?

A A blue shirt.

[95] Q Do you know the name of the man who was with him on that day?

A Yes, I know his name.

Q What was the name of the man who was with him?

A Delroy Christian.

ATTORNEY MARSHACK: I have nothing further of this witness.

THE COURT: Before you hear from our defense counsel, I think it is important to stress that anything arising out of that particular episode went down and Mr. Dowling was acquitted.

The purpose for which this is being brought is limited to the questions and answers the prosecutor brought. Miss Moss.

ATTORNEY MOSS: Thank you, Your Honor. Just a minute please.

ATTORNEY MARSHACK: Your Honor, I move Government's Exhibit 19 into evidence.

THE COURT: 19?

ATTORNEY MARSHACK: 19.

ATTORNEY MOSS: No questions.

THE COURT: 19 is moved.

ATTORNEY MOSS: Subject to my previous objection.

THE COURT: Received. Thank you. You are [96] free to leave or to stay.

THE WITNESS: Thank you.

(THEREUPON, the witness was excused from the witness stand.



## EXCERPT FROM CLOSING INSTRUCTIONS OF DISTRICT COURT

[Transcript of 9-23-87 and 9-24-87]

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[36] When you consider credibility, you have to take into account the credibility of those persons who are making the identification. Because, it is the burden of the Government to prove not only that a series of crimes took place but that Rueben Dowling was the person who committed that crime—those crimes.

Also you heard some testimony about photographs that the police had, and they collected a number of them and put them together for line up. Well, you can't read anything into that. People—the police have a lot of photographs from a lot of people for a lot of reasons, and you can't say just because a person had a picture as part of a police file system that that person committed any crime.

Sometimes in a case [37] evidence of other incidents can be considered not to proffer the character of somebody who is accused of a crime, but it can be considered for among other reasons, to add to the evidence of identity.

In that regard, you have heard testimony from a Miss Viena Henry, contradicted and denied by Mr. Dowling that on July 20th, 1985 Mr. Dowling entered her Home wearing a face mask, carrying a small handgun in the company of Delroy Christian. That was presented to you for your consideration in the contexts, and to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. Mr. Dowling was found not guilty of the crime of robbery in connection with that.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-3650

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UNITED STATES OF AMERICA

v.

DOWLING, REUBEN
(D.C. Criminal No. 85-00070-01)

GOVERNMENT OF THE VIRGIN ISLANDS

v.

DOWLING, REUBEN
(D.C. Criminal No. 87-00071-01)
*Reuben Dowling, Appellant*

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On Appeal from the District Court
of the Virgin Islands (St. Croix)

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Argued April 22, 1988

Before SEITZ, SLOVITER, and BECKER,
*Circuit Judges*

(Opinion filed August 22, 1988)

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SLOVITER, *Circuit Judge.*

Reuben Dowling, who was convicted by a jury of several offenses arising out of a bank robbery, appeals on various evidentiary grounds. Dowling contends that the trial court abused its discretion in refusing to suppress photo identifications, in refusing to allow testimony by Dowling's expert witness on human perception, and in disallowing defense questioning of a witness concerning a civil suit arising out of the robbery, and that the court erred in admitting into evidence testimony concerning a crime for which Dowling previously had been acquitted.

I.

*Facts*

On the afternoon of July 8, 1985, a man armed with a pistol and disguised by a ski mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix, taking approximately seven thousand dollars from two cash drawers. The robber ran from the bank to a parking lot across the street, then returned to the middle of the street and, pointing a gun, commandeered a passing taxi van. After a struggle with the taxi driver, the robber drove away in the van and took off his mask.

Antonio Messer, who had been in the bank but had managed to slip out in the course of the robbery, observed the robber's getaway. He testified that he was approximately fifteen feet away from the robber as he drove past and got a good look at the robber's face. He identified Dowling as the robber.

About a mile outside of Frederiksted, the robber drove the van into the front yard of Hayde Pichardo. Upset because her young children were playing there, Pichardo, who was observing events from her bedroom window, shouted an obscenity at the driver, getting a good look at his face when he made a full stop and stuck his out head to see who had hurled the invective at him. Pichardo's

seventeen-year-old daughter, Amada Rosario, was also in the house and was watching through the window as the driver slowed down and put his head outside. The robber subsequently abandoned the van and fled on foot. Both Pichardo and Rosario identified Dowling as the driver.

Dowling was charged by information with the federal crimes of bank robbery, 18 U.S.C. § 2113(a) (Supp. IV 1986), and armed robbery, *id.* § 2113(d) (1982), and, under territorial law, with two counts of first-degree robbery, V.I. Code Ann. tit. 14, § 1862(2) (Supp. 1987), two counts of third-degree assault, *id.* § 297(2), illegal possession of a firearm during the commission of a violent crime, *id.* §§ 2253(a), 2254, grand larceny, *id.* § 1083(1) (1964), and unauthorized use of a vehicle, *id.* § 1382 (Supp. 1986). He pled not guilty to all the charges.

Dowling's first trial ended in a hung jury. Dowling's conviction following a second trial was reversed on appeal.[1] After a third trial, Dowling was acquitted of the federal and territorial counts alleging possession of a firearm and convicted of the remaining counts. This appeal followed.

II.

*The Photo Identifications*

Dowling argues that the district court should have suppressed the evidence of the pre-trial identifications of Dowling by Pichardo, Rosario and Messer through several photographic arrays. He contends that the arrays were impermissibly suggestive and gave rise to a sub-

[1] We held that because there was a strong possibility that the jury had been exposed to extra-record information as to this case and Dowling's prior criminal conduct, the trial court erred in failing to develop a record sufficient to permit evaluation of the potential prejudice to the defendant. Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).



stantial likelihood of irreparable misidentification. The district court examined the photo arrays and concluded they were not suggestive.

Pichardo and Rosario were separately shown first an array consisting of five photographs, including one of Dowling that was several years old (Gov't Trial Exhibit 15). Both identified Dowling but stated that he looked younger in the photograph. Some time later they were shown an array of six photographs, none of Dowling (Gov't Trial Exhibit 11). They each said the person driving the van was not included. They were then shown an array of six color photographs containing a recent picture of Dowling (Gov't Trial Exhibit 12). Although they initially denied recognizing anyone, each identified Dowling the next day.[2]

Messer was shown the array without Dowling (Exhibit 11) and the array with Dowling's recent picture (Exhibit 12), and picked no one out of the former and Dowling out of the latter.

Dowling complains that he was wearing a red tee-shirt in that exhibit and was pictured with individuals of noticeably different builds and skin hues. However, some of the other men also wore colored tee-shirts. In all three arrays, the photographs were virtually identical in composition and quality, and the men portrayed were reasonably comparable in dress and appearance. We agree with the district court that the photo arrays were not suggestive.

A few days after a line-up, at which Pichardo, Rosario and Messer failed to identify Dowling,[3] they were sepa-

[2] At trial, they explained that they had been reluctant to get involved.

[3] Pichardo and Rosario testified they had recently seen a movie in which, in the words of Pichardo, one of the men in a line-up "jumped through the glass and the thing fall on top of them and he take the gun and shoot everybody," App. at 258, and were too

rately shown an array of photographs taken of the participants in the line-up and each picked out Dowling. Dowling contends that the process was impermissibly suggestive because his photograph was the only one repeated in the photo arrays that the principal witnesses saw prior to the line-up and prior to their viewing of the two arrays of photographs drawn from the line-up. The district court concluded that this repetition standing alone did not affect suggestiveness.

Under some circumstances, repetition of a photograph could be suggestive. However, a degree of suggestiveness does not in itself require exclusion of the evidence. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). If there was a suggestive identification procedure, the question becomes whether the suggestiveness "created 'a very substantial likelihood of misidentification.'" *United States v. Milhollan*, 599 F.2d 518, 522-23 (3d Cir.) (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)), *cert. denied*, 444 U.S. 909 (1979). This question is to be answered with reference to the "totality of the circumstances," with particular attention paid to such relevant factors as the quality of the witnesses' original opportunity to view the criminal, their degree of attention, their level of certainty when confronted with the suspect or his image, and the length of time between the crime and the confrontation. *See Neil*, 409 U.S. at 199-200; *Manson*, 432 U.S. at 114-16.

Here the witnesses all observed Dowling in good light, and had adequate, if not ample, time to form an impression. Messer, whose view was perhaps the least advantageous, made a deliberate effort to make an effective observation because, he testified, he knew he would be asked by the police for a description. Rosario and Pichardo were also more than just casual observers because Dowling was an undesirable intruder. All three witnesses were presented with photo arrays soon after the robbery, and all three identified Dowling's picture from the first array. All three picked no one from the pre-lineup array in which Dowling's photo was absent.

Against this is to be weighed the slight, and likely inadvertent, suggestiveness of the repeated use of different photographs of Dowling in succeeding photo arrays. There is no evidence that the police added in any way to the possible suggestiveness of the repetition, nor that they availed themselves of the photo arrays unnecessarily. Under these circumstances, we cannot say that there was a "very substantial likelihood of misidentification," and therefore the district court did not violate Dowling's right to due process in denying his motion to suppress.[4]

## III.

### *Admission of Expert Testimony*

Dowling contends that the district court abused its discretion in excluding the testimony of Dr. Harry Krop, who Dowling proffered as an expert on the psychological and physiological factors influencing the reliability of

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frightened at the line-up to identify anyone to the police. Rosario stated at trial that she had recognized the defendant. Messer testified that "I know that he was in there" but that he did not make a line-up identification because he was scared and because there were differences in Dowling's weight and hair-style as he appeared at the line-up and Messer's recollection of the robber.

[4] Dowling also contends that the district court abused its discretion in failing to exclude the 1979 picture of Dowling because it was described at trial as the "old" or "1979 photograph", thereby suggesting that Dowling must previously have had contact with the police. Although a different description might have been preferable, the inference that Dowling suggests the jury could have drawn is speculative. The photograph was not a "mug-shot" that was clearly identifiable as the product of an arrest, and its introduction was not reversible error. *See* United States v. Hines, 470 F.2d 225, 229 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

eyewitness identifications. The district court, following the dictates of *United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 725 (1988), and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), conducted an extensive *in limine* hearing. The court held that although Krop qualified as an expert in eyewitness identification, the testimony would not be admitted.

The court gave two reasons for its ruling. The court noted first that Dowling gave the government only five days' notice of the proposed proffer, and stated that "we are inclined to bar the testimony for this reason alone." App. at 368. In *Downing*, we stated that the trial court could consider "[t]he extent to which the adverse party has had notice of the evidence and an opportunity to conduct its own tests or produce opposing experts," 753 F.2d at 1241. The late proffer substantially prejudiced the government because, on such short notice, it could not reasonably be expected to search for its own expert and find one available to come to the Virgin Islands in time to be given the available facts and the opportunity to assimilate them. We therefore cannot hold that the district court abused its discretion in declining to admit the testimony on this ground alone.

The district court found "an additional compelling reason" to bar the testimony on the merits, concluding that the testimony would not aid the jury in reaching an accurate resolution. This, of course, as Judge Becker stated in his trailblazing opinion in *Downing*, is "[t]he touchstone of Rule 702." 753 F.2d at 1235.[8]

In *Downing*, we held that the district court should balance the general reliability of the scientific principles

[8] Fed. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."



and their potential in aiding the jury against the likelihood that such information would mislead or overwhelm a jury. 753 F.2d at 1240. In addition, as Judge Becker thereafter explained in *Sebetich*, "admission depends upon the 'fit', *i.e.*, a specific proffer that the testimony will focus on particular characteristics of the eyewitness identification at issue and discuss how those characteristics call into question the reliability of the identification." *Sebetich*, 776 F.2d at 419.

The district court here recognized the "fairly established though controversial" nature of Krop's field, App. at 386, but found that "there was no testimony tying the specific data in the area of eye-witness identification to the eye-witness identifications under consideration here." App. at 386-87.[9]

From our review of the transcripts of the *in limine* hearing, in which Krop was questioned on the application of his expertise to the eyewitness, photographic and line-up identifications of the principal prosecution witnesses, Pichardo, Messer and Rosario, we find adequate support for the district court's conclusion. Krop testified that serious stress at the moment of observation usually reduces recall. Although this was arguably relevant as to Pichardo, who may have been afraid that her children were in danger or angry at the person who endangered them, Krop himself testified that Messer "probably would not have been in a high stress situation" and "would

[9] Dowling contends that the court erred in stating "that there were no scientific studies, treatises, etc. upon which Dr. Krop's testimony would be based," Appellant's Brief at 9, but our reading of the district court's opinion is different. Having reached the issue of "fit," the court had necessarily found there to be a sufficient scientific basis for Krop's testimony, and the court's statement that "there was simply no proffered proof reflecting treatises, reports, workshop results, research data or the like, *as to the possible misidentifications in this case*," App. at 387 (emphasis added), went to the lack of a connection between Krop's acknowledged expertise and the particular facts presented.

probably have a fairly good reliability for recall," App. at 53, and that it "does not sound like [Rosario] was in a high level of stress" when she viewed Dowling in the van, App. at 65.

Krop referred to the "weapon focus phenomena," App. at 33, the tendency of a person to focus more on the weapon than on the person wielding it, but there was no assertion that any of these witnesses made their observations while faced with a weapon. Similarly, Krop testified that fifteen seconds is "generally viewed as the minimal amount of time that a person has to view a situation to be able to give fairly accurate recall," App. at 48, but there was no testimony at the hearing that any of the witnesses had less than fifteen seconds in which to view the suspect; on the contrary, in the Messer and Pichardo fact-patterns presented to Krop both were said to have had thirty seconds. App. at 53, 55-56. Krop testified that reliability was impaired when the witness was younger than thirteen or fourteen or older than sixty-five, but there was no evidence that the witnesses were in those age groups.

Krop was proffered various observations on the photo array identifications, but conceded under questioning by the court that virtually all his observations on the photo arrays were based on or equivalent to those to be derived from common sense. Krop's observation that witnesses presented with a series of photo arrays in which only the suspect's photo is repeated may "recognize" the suspect in one of the latter arrays based only on his familiarity from the earlier ones is of limited value in this case because, as we noted earlier, Dowling's picture was not repeated in each of the three pre-lineup arrays. Finally, Krop did not suggest that his testimony had any particular relevance to the identifications of the post-lineup pictures; instead he stated that "in terms of the lineup . . ., it sounds like where psychological theory is more relevant would be in terms of the original . . .



perception . . . as opposed to the methodological identification during the lineup." App. at 85.

As these examples suggest, nearly all the factors Krop was prepared to testify affected witness reliability were not present in this case. Further, many of his observations were of the type no expertise was required to make. While the relevance of the testimony at least as to Pichardo's reliability is a closer issue, the district court properly applied the teachings of *Downing*, and we cannot say that its decision to bar the evidence was an abuse of discretion. *See Downing*, 753 F.2d at 1240; *see also Sebetich*, 776 F.2d at 419.

## IV.

### *Evidence of a Witness' Prior Civil Suit*

Dowling also contends that the district court erred in disallowing Dowling's questioning of Messer regarding his loss of a civil suit against the bank for recovery of money he allegedly lost in the bank robbery. Dowling argues that because the civil suit had been characterized by the judge presiding in that case as "bordering on the frivolous" and because the verdict represented the jury's rejection of Messer's claim that he left money on the counter of the bank during the robbery, this was relevant cross-examination of Messer which he should have been able to use to impeach Messer's credibility.

Under Fed. R. Evid. 608(b), the district court has the discretion to admit evidence of specific instances of conduct to impeach a witness' credibility "if probative of truthfulness or untruthfulness." *See United States v. Bocra*, 623 F.2d 281, 287-88 (3d Cir.), (review for abuse of discretion), *cert. denied*, 449 U.S. 875 (1980). The Advisory Committee Notes to Fed. R. Evid. 608(b) caution that "the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.*

In this case, the district court noted that the civil jury's decision could have been based on grounds other than disbelief in Messer, and that examination on the entire civil suit was "far too much outside of the issue." App. at 220-21. The court did allow Dowling to use previously introduced photographs of the bank during the robbery to impeach Messer insofar as he testified on direct that he left the money on the counter. The court did not abuse its discretion in holding that the danger of confusion so outweighed the probative value of the evidence as to justify barring that line of questioning.

## V.

### *Evidence of Acts Subject to a Prior Acquittal*

### A.

### *Propriety of the Evidence*

We turn finally to the most troublesome issue raised by this appeal, the court's admission of the testimony of Vena Henry, who described how a man wearing a knitted mask with cut out eyes (of a different color than the one worn by the bank robber) and carrying a small handgun (which was similar to the black silvery gun used in the bank robbery), accompanied by Delroy Christian, broke into her home in Frederiksted two weeks after the robbery, and how, in a struggle, she pulled the mask off the intruder, whom she identified as Dowling. App. at 143-44. Dowling was thereafter charged by the Government of the Virgin Islands with burglary, attempted robbery, assault, and weapons offenses, and was acquitted after a trial. App. at 147; Information, Criminal No. 85-64.

Dowling argues that the introduction of Henry's testimony was in violation of Fed. R. Evid. 404(b)[7] and

[7] Evidence of "other crimes, wrongs, or acts" may be admitted to prove, among other things, identity, but not "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b); *see, e.g.*, United States v. Milhollan, 599 F.2d 518, 524-25 (3d Cir.), *cert. denied*, 444 U.S. 909 (1979). *See generally* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[15] (1986) (discussing proof of identity through "evidence of a crime which has the same unusual features as the charged crime").



improperly prejudiced him under Fed. R. Evid. 403. Dowling relies on our decision in *United States v Keller*, 624 F.2d 1154, 1159 (3d Cir. 1980), the closest precedent in this court.

The defendant in *Keller*, who had been convicted of conspiracy to distribute a controlled substance following the jury's rejection of his entrapment defense, claimed on appeal that the trial court had erred in permitting the government to undermine his defense by questioning him about other drug transactions for which he had been prosecuted and acquitted. We reversed, holding that the doctrine of collateral estoppel barred the evidence. *Id.* at 1157-60.

In *Keller*, we referred to the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause, *see, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Venable*, 595 F.2d 71 (3d Cir. 1978), but we relied for our holding on this court's precedent, *see United States v. Simon*, 225 F.2d 260 (3d Cir. 1955); *United States v. De Angelo*, 138 F.2d 466 (3d Cir. 1943), that "consistently applied [the doctrine of collateral estoppel] to bar the evidentiary use of crimes for which the defendant has been acquitted." 624 F.2d at 1160. We quoted with approval the following statement by the Fifth Circuit:

> [i]t is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit.

*Wingate v. Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972), *quoted in Keller*, 624 F.2d at 1160.

The government argues that *Keller* notwithstanding, the evidence was admissible in this case because the issue of Dowling's identity and his use of a knitted mask and small handgun in the Henry incident was not determined in his favor by the acquittal verdict. It cites as legal authority a district court opinion in *United States v. Hill*, 550 F. Supp. 983 (E.D.Pa. 1982), *aff'd mem.*, 716 F.2d 893 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984), which it states holds that *Keller* is only applicable where the evidentiary fact sought to be introduced in a subsequent trial "has been actually determined in defendant's favor in the trial which resulted in defendant's acquittal." Appellee's Brief at 22. That is not what *Hill* held.

In *Hill*, the defendant, who had been tried at his first trial on seven counts, was acquitted on two and found guilty on five. After this court reversed and remanded for a new trial on those counts, defendant was again found guilty. Obviously, as the district court there noted, evidence in support of the five counts on which Hill was previously found guilty was not precluded by our opinion in *Keller*. 550 F. Supp. at 988. The court further determined that even if it was error to admit evidence of the distribution for which Hill was acquitted, it was harmless beyond a reasonable doubt. *Id.* at 988-89. Nothing in *Hill* puts the gloss on *Keller* that the government argues.[8]

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[8] Moreover, in *Keller* we rejected a virtually identical argument to that made by the government here, saying:

> The Government argues . . . that . . . Keller did not deny the fact of his participation in the drug distributions but claimed that he was excused from criminal prosecution because he was entrapped. The Government contends that collateral estoppel is inapplicable because "[i]t is not the *result* of the prior case that was material, but rather the *facts* which were undisputed." Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law. We decline to so hold since that would eviscerate the effect of the prior acquittal.

*Keller*, 624 F.2d at 1160 (citations omitted); *accord* Blackburn v. Cross, 510 F.2d 1014, 1017 (5th Cir. 1975) ("there is no difference between relitigating an ultimate fact or an evidentiary fact: relitigation of either is prohibited" by doctrine of collateral estoppel); *see also* United States v. Crispino, 586 F. Supp. 1525, 1530-32 (D.N.J. 1984).



Nor is there any evidence to support the government's premise that the issue of Dowling's identity and his use of the knitted mask and small handgun was not determined in his favor by the acquittal. No extrinsic evidence of the record in the earlier case against Dowling was introduced. Apparently, the same trial judge presided in both. The following colloquy in this case is the only light shed on the events in the other:

> [ASS'T U.S. ATTORNEY]: Your Honor, having the case described to me—I wasn't here—but the Defense in the case presented, not through Mr. Dowling but through his co-defendant Delroy Christian, it was not a robbery. The two of them merely came to retrieve from an individual in the house money from an individual in the house.
>
> THE COURT: Mr. Dowling's presence in the house was not seriously contested in the case *but he stated the general defense.* Mr. Dowling, I don't think, took the stand.

App. at 154 (emphasis added).

This is an insufficient basis on which to conclude that the issue of Dowling's participation in the robbery was not determined. Since Dowling entered a new guilty plea and did not testify, the government was required to prove all the elements of the case against him beyond a rea-

sonable doubt. His co-defendant's explanation imposed no burden on him. Even assuming that Dowling's identity and presence in Henry's house were not specifically disputed, we believe that the government cannot legitimately assert that evidence concerning one element of an offense is separable for evidentiary purposes from a jury's general verdict of acquittal merely because it was not directly contradicted.[9]

Even apart from *Keller*, we believe the evidence in this case was inadmissible. The Supreme Court has recently had occasion to consider the operation of Fed. R. Evid. 404(b) in *Huddleston v. United States*, 108 S. Ct. 1496 (1988) (holding that a federal district court need not find that the government has proven the similar act by a preponderance of the evidence before it is admissible under Rule 404(b)). The Court stated that, "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at 1501. It follows that when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude "that the act occurred and that the defendant was the actor."

Even if the *Huddleston* analysis would not, of itself, exclude as irrelevant all acts which were the subject of a prior acquittal, in this case the evidence of pattern on which the district court relied was at best tenuous. The district court held that the evidence of the Henry incident "falls well within the ambit" of Rule 404(b) because "the common features that link the bank robbery

[9] This issue is distinguishable from that which arises when a defendant has been acquitted on one count of a multi-count indictment and is being retried on other counts. Courts have held that acquittal on one charge arising out of a set of facts does not preclude the use of the same evidence to prove a second charge on retrial. *See* United States v. Gentile, 816 F.2d 1157, 1164 (7th Cir. 1987). We express no view on that issue.



and the later occurrence are largely the mask and the gun, albeit a mask of different color or the like, and no evidence that the gun was the same, except that it was a small caliber handgun." App. at 159-60.

The balance required by Fed. R. Evid. 403 necessitates a consideration of prejudice as well as probative value. In *United States v. Beechem*, 582 F.2d 898 (5th Cir. 1978) (in banc), *cert. denied*, 440 U.S. 920 (1979), approvingly cited in *Huddleston*, 108 S. Ct. at 1501, the court pointed out that "[o]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for extrinsic offense." 582 F.2d at 914. The court continued, "[t]his danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." *Id.*

When the limited similarity of the alleged offense behavior in the bank robbery and the Henry incident is coupled with the fact that the jury's verdict in the Henry occurrence must be taken to signify that it was not proven that Dowling committed the "bad" act charged (either because it was not Dowling or it was not a robbery), the marginal relevance of the evidence was more than amply outweighed by the potential prejudice. *See United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968). We thus conclude that in addition to being inconsistent with *Keller*, the admission of the Henry testimony was an abuse of discretion.

B.

*Effect of the Error*

A new trial is necessary only if the error in admitting the evidence was not harmless. We need not in this case be convinced that the error was harmless beyond a reasonable doubt. In *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1899

(1987), this court held that when the challenged instruction did not affect a constitutional right, "we must apply the 'highly probable' standard of appellate review to determine the harmlessness of the error." *Accord Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). We explained further that, "'[h]igh probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant' but need not disprove every 'reasonable possibility' of prejudice." *Grayson*, 795 F.2d at 290 (citing *United States v. Jannotti*, 729 F.2d 213, 219-20 & n.2 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984)).

The putative prejudice flowing from the admission of Henry's evidence is that it influenced the jury's conclusion that Dowling was the masked robber. However, as the district court stated at sentencing, the evidence was "overwhelming". Sentencing Transcript at 16. In this case, there were three positive identifications, Messer testified that he had "a clear recollection in [his] own mind of what the face of the man looked like" who ran from the bank and removed the mask from his head. App. at 201. He testified that it was a clear day and he had a clear view of what was going on. App. at 197-98. He stated that as the man passed him, "I knew I was trying to identify somebody, looking for a feature or face or something like that, because I know I would have to say something to the police officials or give a description or something like that." App. at 197.

Pichardo was equally certain in her identification of Dowling as the man who drove into her yard.[10] She stated, in identifying Dowling in the courtroom, "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks." App. at 249. Rosario also gave a positive identification of Dowling at the trial. Messer not only saw the robber take off his mask, but pursued the taxi van in his own vehicle to where the van was abandoned near Pichardo's home in Estate Smithfield. This forges an iron link between the eyewitness accounts of the robbery and the identifications of the van's driver by Pichardo and Rosario. Finally, as we discussed above, each of the eyewitnesses identified Dowling through various photographic arrays shown to them shortly after the robbery.

[10] The defense brief concedes that the man who drove into the Pichardo yard was the bank robber.



There was other strong evidence. Messer testified that the robber was tall, fit and clad in a green army shirt, a description that was corroborated by numerous witnesses. Bank employees Williams, Sanes, Austin, Moorehead and Santiago all remembered the robber wore a green army shirt, several of them also testifying that he was athletically built and six feet or more tall. Bank customer Fabio also testified that the robber was an athletically built man, about 6' 1" tall, wearing a green shirt. A Special Agent of the F.B.I., who had used the bank security photographs of the robbery to estimate the robber's height, testified that he was probably at least 6 feet tall. Of course, the jury was able to judge for itself whether this description matched Dowling's physique.

The government also presented a strong circumstantial case hinging on the robber's haphazard getaway. The government's theory presented to the jury was that it was unlikely that a robber who took pains to conceal his face with a mask and who wore gloves to avoid fingerprints would have no better getaway plan than to hijack a taxi. Numerous witnesses testified that the robber had run around outside the bank after the robbery apparently looking for something. The government posited that the robber's original plan to leave by a getaway car had been foiled while he was in the bank.

The government presented the testimony of several witnesses to support this theory and to connect Dowling to the crime. Philip Tutein testified that Dowling had bor-

rowed a white Volkswagen a day or two before the robbery. Anthon Christian, a police official, testified that on the morning of the robbery, he noticed a white Volkswagen stalled on a road occupied by a man wearing a green army shirt and the same kind of hat from which the robber's mask was made, and that he noted the license number of the car, which was later identified as Tutein's. Police sergeant Anita Christian testified that at about the time of the robbery, she was patrolling in town and saw a white Volkswagen parked at a spot later described as near the bank. The front door of the car was open and it was occupied by two persons, one of whom was her cousin Delroy Christian. She asked the driver to close the door, and the car then drove off and out of town. Dowling himself testified that he knew Delroy Christian. He also admitted borrowing Tutein's white Volkswagen and was unable to proffer any evidence as to where he was on July 8.

Of course, we cannot entirely discount the possibility that there may have been some prejudice to Dowling by the introduction of Henry's testimony which, if credited, implicated Dowling in a prior bad act. Also, the government in its closing statement pointed to Henry's identification of Delroy Christian as accompanying Dowling, which could be seen as supporting the government's theory of the getaway car.

However, our standard on harmless error applicable here is not one of certainty of no prejudice, but one of "high probability". In that connection, we note that the district court did caution the jury in its general instructions as to the limited value of the Henry testimony. The court stated that the Henry testimony "was presented to you for you to consider in the contexts, and to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. Mr. Dowling was found



not guilty of the crime of robbery in connection with that." Supp. App. at 29. The prosecutor also pointed in his closing to the limited purpose for which the Henry evidence was admitted, and defense counsel stressed Dowling's acquittal in her opening statement to the jury.

Moreover, when Dowling testified in his own defense, he stated that he was acquitted in the Henry incident charge but admitted that he had been convicted of another bank robbery in 1979.[11] In light of that testimony, which was properly admitted, it is unlikely that the admission of the Henry testimony more than marginally affected the jury's overall character assessment of Dowling.

There are instances in which the erroneous admission of prior bad acts evidence will not be harmless. Evaluation of the prejudice occasioned by a trial error is a fact-specific process. In light of our review of the entire record, we conclude that there is a "high probability" that the error in admitting the Henry testimony did not prejudice Dowling. *See United States v. Ezzell*, 644 F.2d 1304, 1306 (9th Cir. 1981) (where three eyewitnesses to bank robbery identified defendant and he was photographed by the security camera, error in admitting evidence of prior bank robbery was harmless).

## VI.

For the reasons set forth above, we will affirm the judgment of conviction.

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[11] Instructing on impeachment, the court stated: "[O]ne of the ways in which impeachment evidence is permitted is if a person testifies then that person may be demonstrated to have had a prior felony conviction and that that happened in this case when Mr. Dowling exercised his rights to take the stand and testify under oath. Then it was permitted to be shown that in 1979 he was convicted of the felony of bank robbery." Trial Transcript, September 24, at 38.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-3650

UNITED STATES OF AMERICA

v.

REUBEN DOWLING, ETC.,
*Appellant*

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SUR PETITION FOR REHEARING

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Present:

GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by Appellant, Reuben Dowling in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ K. Shorter
Circuit Judge

Dated: September 28, 1988



SUPREME COURT OF THE UNITED STATES

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No. 88-6025

REUBEN DOWLING,
*Petitioner*

v.

UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

February 27, 1989